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IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1959

No. [redacted]

CHARLOTTE ANDREWS,

Plaintiff and Appellant,

vs.

THE CITY OF SAN BERNARDINO, et al.,

Defendants and Appellees.

CHARLOTTE ANDREWS,

Plaintiff and Appellant,

vs.

THE CITY OF SAN BERNARDINO, et al.,

Defendants and Appellees.

Appeal to the Supreme Court of the United States
From the District Court of Appeal, Fourth Appellate
District, State of California

APPELLEES' MOTION TO DISMISS OR AFFIRM

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IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1959

No. 997

CHARLOTTE ANDREWS,

Plaintiff and Appellant,

vs.

THE CITY OF SAN BERNARDINO, et al.,

Defendants and Appellees.

CHARLOTTE ANDREWS,

Plaintiff and Appellant,

vs.

THE CITY OF SAN BERNARDINO, et al.,

Defendants and Appellees.

Appeal to the Supreme Court of the United States From the District Court of Appeal, Fourth Appellate District, State of California

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APPELLEES' MOTION TO DISMISS OR AFFIRM

Appellees move that this appeal be dismissed or, in the alternative, that the judgments appealed from *Andrews v. City of San Bernardino*, (175 A.C.A. 481,

346 P. 2d 454; and 175 A.C.A. 499, 346 P. 2d, 457) be affirmed on the following grounds:

1. The appeal is not within the jurisdiction of this Court because it has not been taken in conformity to the Rules of this Court. (Rule 16, 1(a).)

2. The Appeal does not present any substantial Federal question. (Rule 16, 1. (b) (c).)

3. The Federal questions, sought to be reviewed, although not substantial, were not timely or properly raised, nor expressly passed on by the State Court. (Rule 16, 1. (b).)

4. The judgments of the State Court rest on an adequate non-Federal basis. (Rule 16, 1. (b).)

Appellant, in her Notice of Appeal, page 1, and also in her Jurisdictional Statement, page 2 states that this Appeal is taken pursuant to 28 U.S.C.A. 1257 (2) and (3). The second of these two sections covers a review of a State Court decision by Writ of Certiorari. From the contents of the Notice of Appeal and the contents of the Jurisdictional Statement filed by Appellant, it appears that her proper remedy is to apply for a Writ of Certiorari. In view of the fact that under 28 U.S.C.A. 2103, the Court is entitled to consider an Appeal as an application for a Writ of Certiorari and that the misapprehension of the Appellant as to her proper remedy is not a ground for dismissal, Appellees request that this Motion to Dismiss or Affirm, be also treated as a brief in answer to an application for Writ of Certiorari, in the event the Court considers Appellant's Appeal as a petition for Writ of Certiorari.

I.

APPEAL SHOULD BE DISMISSED FOR FAILURE OF APPELLANT TO COMPLY WITH RULES OF THIS COURT

Since consideration of whether Appellant has conformed to the Rules of this Court in presenting her Notice of Appeal and Jurisdictional Statement, does not require consideration on the merits of the points raised in the Appeal, Appellees will present this part of the motion preliminary to their discussion of the merits of the Appeal and the other bases on which the Motion to Dismiss or Affirm is predicated.

Attention is directed to the fact that the Notice of Appeal is *42 pages* long. Rule 10, 2. (c) requires that the Notice of Appeal

> "Shall set forth the questions presented by the Appeal, expressed in the terms and circumstances of the case but without unnecessary detail. The statement of the questions should be short and concise, should not be repetitious, and should not resemble in form or particularity the former assignments of error which are abolished by paragraph 1 of this Rule . . . . . a failure to comply with these requirements will be a sufficient reason for dismissing the Appeal."

A casual reading of the Notice of Appeal will indicate that it does not conform to this Rule. It contains a mass of unessential, redundant and argumentative material not permissible under the Rules. It contains almost a complete recital of all of the allegations in the suits from which an appeal has been taken. It cites authorities, references to transcripts, quotations from

Court decisions and statutes, all of which are more properly presentable elsewhere in an appeal.

An essential of a Notice of Appeal is that the questions presented be expressed with such explicitness that the issues on the Appeal are clearly set out. In this respect the Notice of Appeal fails to comply with the Rules. On page 6 of the Notice of Appeal in Paragraph VII, an attempt is made to state the "Federal questions" involved. They appear to be set forth in what are stated to be six "inter-related" steps. Assuming that this arrangement is meant to indicate that there are six Federal questions involved, a reading of these "inter-related" steps fails to reveal how or in what manner the recital of alleged grievances gives rise to "Federal questions" subject to review.

The "First Inter-Related Step" set forth on Page 7 of the Notice of Appeal merely states that a Municipal Corporation "abridged said electors privileges as United States Citizens" but does not state how or in what manner, or by what act this occurred.

The "Second Inter-Related Step" set forth on Page 8 merely states that a Municipal Corporation deprived property owners of the right to present evidence contrary to procedural due process, but again how or in what manner, or by what act or conduct this was brought about so that a Federal question arose, is not indicated.

The "Third Inter-Related Step" on Page 8 simply states that a certain Notice of Hearing "was inadequate" and deprived petitioner of the opportunity contrary to due process to defend against a Redevelopment Plan. No indication is given as to how the Notice was inadequate or whether or not it complied with the

Redevelopment law in question (which in fact it did, as will hereinafter be set out).

The "Fourth Inter-Related Step" simply recites that there was a referendary petition and the conclusion that the Municipal Corporation ignored it. No indication of a Federal question is made.

The "Fifth Inter-Related Step" set forth on Page 9 alleges "illegal and discriminatory conduct" denying petitioner "the equal protection of the laws and due process", but again there is no indication what acts or conduct are involved which would lead to a Federal question.

The "Sixth Inter-Related Step" on Page 9 simply states the conclusion that a Municipal Corporation "withheld procedural action which would have given petitioner access to Courts" thereby depriving her of "equal protection of the laws and taking of her property without due process of law". Here again no indication is made what kind of procedural action is referred to, or how and in what manner the act of the Municipal Corporation gave rise to a federal question.

The *Jurisdictional Statement* does not conform to Rule 15 in various particulars. According to Rule 15, 1. (c) (2) it "may not raise additional questions or change the substance of the questions already presented". The Jurisdictional Statement on file herein on Page 4, paragraph 6, sets forth an entirely new "question" which is not contained in the Notice of Appeal. Moreover the question indicated as "Fifth Inter-Related Step" on Page 9 of the Notice of Appeal is *not* contained in the questions presented in the Jurisdictional Statement.

The Jurisdictional Statement fails to comply with Rule 15, 1. (d) in that it does not indicate the manner in which the alleged "Federal questions" were raised, nor the method of raising them, nor the way they were passed upon by the Court, nor does it contain "such pertinent quotations of specific portions of the record" as will support the assertion that the rulings of the Court were of a nature to bring the case within the statutory provision believed to confer jurisdiction on this Court. Appellant attempts to conform to this Rule requirement on Pages 10 and 11 of her Jurisdictional Statement. An examination thereof will indicate a failure to comply with this Rule without Appellee particularizing its lack of compliance.

The Jurisdictional Statement fails to comply with Rule 15, 1. (e) in failing to set forth why the Federal questions allegedly presented "are so substantial as to require plenary consideration . . .". Starting with Page 12 of the Jurisdictional Statement and continuing to the end of the document under the heading "The Questions Are Substantial" the Appellant merely argues her entire cause, the recital including argumentative material, evidentiary matter, and subject matter entirely unrelated to the raising of a Federal question, none of which is helpful in determining whether the Federal questions were "substantial" as to require plenary consideration.

It is respectfully submitted that the Appeal should be dismissed for want of compliance with the Rules of the United States Supreme Court.

II.

STATEMENT OF FACTS

For a clarification of the issues presented by the Ap-

peal, it appears very important at the outset that the factual background which has given rise to this controversy be set forth.

The City of San Bernardino is a Municipal Corporation in Southern California, governed by State and Federal Law, and State and Federal Constitutions, *and also a Charter*, which under applicable State Law, has been approved by the State Legislature. Since at least 1950, there has been local interest in the *redevelopment* of certain areas within the City in accordance with the State Community Redevelopment Law as set forth in the California *Health and Safety Code, Sections 33000 et seq.* The Act provides for financing of projects by Federal Government Agencies.

The *legislative power* of the City is vested in a Mayor and Common Council, exercised by the enactment of ordinances, resolutions and orders, adopted in the manner set forth in the City Charter. The City Charter also provides for the exercise of *initiative* and *referendum* powers by its voters. (See City Charter Provisions in the Appendix).

In November 1950, the *then* Mayor and Common Council, as an *advisory proposition*, asked for an expression of opinion of its citizens on the following question:

> SHALL THE MAYOR AND COMMON COUNCIL OF THE CITY OF SAN BERNARDINO CREATE AND ESTABLISH A REDEVELOPMENT AGENCY PURSUANT TO THE PROVISIONS OF THE CALIFORNIA COMMUNITY REDEVELOPMENT ACT?

This did not constitute an exercise of the *initiative*

rights of the citizens since no initiative petition had ever been submitted in support of it. It obviously was not an exercise of *referendum* powers since it had never before been an ordinance or law of the City. The proposition itself was not an *ordinance*, as Appellant erroneously calls it in her Appeal. There had been no *ordinance* adopted by the City Council to implement the proposition if it had at that time been approved by the electors. There was an ordinance *calling the election* (No. 1896), but this ordinance was only a procedural step in order to bring the proposition to a vote (Appellant confuses this *ordinance calling an election*, as somehow making the proposition voted upon as constituting an *ordinance*).

This proposition received a negative vote in November 1950. Thereupon the Mayor and Common Council of San Bernardino *abandoned* any effort to establish a Redevelopment Agency, in accordance with the wishes of the electors at that time.

Subsequently, in June 1952, a *different* Mayor and Common Council under the legislative powers vested in them by the City Charter, adopted a resolution activating a Redevelopment Agency for said City under the State Community Redevelopment Law. At that time the City was governed not only by a Mayor who was not in office in 1950, but also by a Council of which three of the five members had been elected in 1952, and who were *not* on the Council in 1950. This resolution was therefore enacted by a legislative body comprised of members a majority of whom had *not* participated in the presentation of the proposition to the voters in 1950.

Thereafter the City Council appointed the members of the Redevelopment Agency, adopted resolutions

designating "blighted areas" requiring redevelopment, and carried out the various steps required by the State Community Redevelopment Law, until March 31, 1958, when, pursuant to notice complying with the State Community Redevelopment Law, by *ordinance* it adopted and approved a *tentative* plan of redevelopment of a certain area in the City (Ordinance No. 2217).

After the adoption of this ordinance approving the tentative plan Appellant brought her *first action*, which is one of those the subject of this Appeal, claiming that the proposition submitted to the voters in 1950, was an *ordinance* or *law* and that it forever stayed the hands of any Mayor and Common Council of the City from forming a Redevelopment Agency, except by subsequent approval of the electorate. In this action Appellant also complained that although she had obtained Notice of the Hearing before the City Council and had in fact appeared at the hearing, that she was entitled to additional time to present evidence, in spite of the fact that the City Council *did* accede to her demands and grant her one continuance, *not* provided for in the Community Redevelopment Law. Appellee demurred to the three causes of action set up by Appellant, which demurrer was sustained without leave to amend, and which decision was affirmed by the Fourth District Court of Appeal of California, rehearing denied, and hearing denied by the California Supreme Court.

The *second action* brought by Appellant, also the subject of this Appeal, arose out of subsequent events with respect to the Redevelopment project of the City. After the adoption of the tentative plan by Ordinance of the City Council in March 1958, the tentative plan was given further consideration by the City

and Redevelopment Agency authorities and in July 1958, after a *hearing* held in conformity with the State Community Redevelopment Law, the *final* plan was adopted by Ordinance No. 2233, approved July 21, 1958. The contents of this ordinance are dictated by Section 33733 of the State Community Redevelopment Law. Although denominated an ordinance it is not of the kind which sets forth law or rules of conduct—instead it contains simply a recital of the *findings* of the City Council, a description of the property, and procedural provisions.

After the adoption of this ordinance petitions were circulated in the City of San Bernardino by Appellant and others, and necessary signatures obtained requesting the City Council either to rescind this ordinance, or under the *referendum* provisions of the City Charter call an election thereon and submit the ordinance to the vote of the electors. On the advice of its City Attorney the City Council held that this was only a procedural ordinance and under applicable State Court decisions was *not* the kind of an ordinance subject to referendum powers.

On the announcement of this decision, and refusal of the Council to call such an election Appellant filed her *second suit*, contending that this ordinance was subject to *referendum*. A demurrer to her Writ of Mandate was sustained in the Superior Court. Her Appeal to the Fourth District Court of Appeal sustained the lower Court's decision and her request for hearing by the California Supreme Court was denied. From this determination Appellant has appealed to this Court.

Although this Statement of Facts is rather lengthy,

it has appeared necessary, in view of the confusion of issues as set forth in Appellant's Notice of Appeal and Jurisdictional Statement.

It will appear from the foregoing recital that *State Law*, and not *Federal Law*, nor Federal Constitutional provisions, loom up as affording complete determination of Appellant's contentions, and that the existence of "Federal questions" of a "substantial" nature are not likely to be found to exist. Appellees will now bring this question into focus hereinafter.

(CAUTIONARY NOTE: The Court's attention is directed to the Petition of Appellant in her *second* action, set forth in the Clerk's Transcript in Case No. 94346 (Appellate Court, 4th Civil No. 6243). That part of the Petition set forth on pages 1 to 18 of the Clerk's Transcript is a *repetition* of the allegations contained in the Petition which is the subject of the *first* Appeal. The only part of this *second* Petition which is before this Court on appeal is that part on pages 34-36 of the Clerk's Transcript setting forth the issue pertaining to the *referendum* petition. The part set forth on pages 18-34 of the Clerk's Transcript, having to do with the *hearing* on the final redevelopment plan, is STILL AT ISSUE BEFORE THE SAN BERNARDINO COUNTY SUPERIOR COURT, AND THAT ISSUE *HAS NOT YET BEEN TRIED*. That part of the petition should therefore not be considered on this Appeal. It raises the issue as to the conduct of the hearing before the Council on the *final* redevelopment plan, and remains to be determined by the California Courts, including the trial Court. The separation of the issue respecting the disposal of the *referendum* petition was agreed upon by Counsel in view of the fact that it presented a question of *law* only, whereas the issue respecting the conduct of the hearing on the final

plan would require a trial, introduction of evidence, and examination of witnesses as well as application of law thereto.)

III.

FEDERAL QUESTIONS SOUGHT TO BE REVIEWED ARE NOT TIMELY OR PROPERLY RAISED, OR EXPRESSLY PASSED UPON BY THE CALIFORNIA COURTS

On Page 10 and 11 of the Jurisdictional Statement Appellant attempts to show where and in what manner Federal questions relied upon were raised in the prior proceedings. No attempt is made to show "the way in which they were passed upon by the Court" as required by the Rules. Appellant sets out *three* provisions which she claims raised one or more Federal questions:

(1) "Before the State Municipal Corporation during its adjudicatory hearings". Reference is made to portions of a Reporter's Transcript. Such Reporter's Transcript is not one of the exhibits brought before this Court (See Pages 2 and 3 of Notice of Appeal) nor was such Transcript *brought before any of the California Courts*, as the issues appealed from were disposed of on hearing on *demurrer* to Appellant's petitions, and quite obviously a Reporter's Transcript was not a part of either of such petitions.

(2) Appellant next states that the Federal questions were raised in Paragraphs III and XIII of the petition for Writ of Mandate in Case No. 92497, and as incorporated by reference in successive causes of action in said petition (Clk. Tr. pages 3 and 8). It is true that in said Paragraph III, Appellant alleges

"that the Defendants, *as hereinafter set forth*, are at the present time exercising an unlawful and illegal authority, power and jurisdiction over the property of the above-named Plaintiff, as well as the property of other persons similarly situated, by *unauthorized proceedings, order and decisions*, and unless prevented by appropriate action of this Court, Plaintiff will be illegally, unlawfully and arbitrarily deprived of her property, without due process of law, in violation of the Constitution of the United States, and of the Constitution of the State of California. . . ." In Paragraph XIII the only allegation is that the Defendants "without lawful authority and illegally" did enact Ordinance No. 2217 and "subject to Redevelopment proceedings and exercise unlawful and illegal authority and jurisdiction over the property of Plaintiff and others similarly situated, for which there is no adequate remedy at law unless restrained by this Court. . . ." No other reference to raising any Federal question appears in this petition. Although Appellant, apparently by these allegations, sought to raise a Federal question, *the other allegations in her petition do not show any reliance whatever on the violation of any constitutional rights or guarantees.*

Moreover the *trial* Court in its judgment in Case No. 92497 passed on *no Federal question* (See Appendix (B) pages 23-25 of Jurisdictional Statement).

Furthermore on the *Appeal* of the trial Court's decision in this action *Appellant's opening brief does not raise any issue of a Federal question*, cites 21 California Appellate Court decisions in support of her contentions, and makes only one three line quotation from any Federal decision to the effect "it behooves the Courts to be alert lest currently attractive projects infringe on fundamental rights. (Schneider v. District

of Columbia, 117 Fed. Supp. 705.) Appellees' *reply brief* cited no Federal cases as no Federal question was presented. The decision of the Fourth District Court of Appeals does not pass upon any Federal question or cite any Federal decisions for the same reason — that *no Federal or Constitutional question was raised on Appeal.* (See First Appellate decision, page 29 of Appendix to Jurisdictional Statement.) The Appellate Court cited only California Appellate and Supreme Court decisions, as these were determinative of the questions presented on the Appeal. ALL OF WHICH WERE NON-FEDERAL IN NATURE.

(3) In the *second action* brought by Appellant, (Case No. 94346) she claims that a Federal question was raised by the *prayer* of her petition, which in general terms asked the State Court to "make its order directing said Common Council to permit petitioner to produce and present material evidence, in accordance with proper procedural rules, in compliance with due process of law." It is a rule of long standing that the *prayer* of any petition or complaint, unsupported by any previous allegations, is no part of the statement of a cause of action. The subject matter of an action and the issues involved are determinable from the *facts alleged* and not from the prayer. (See 39 Cal. Jur. 2d 138) In this *second* action the lower Court in rendering its decision cited no *Federal* cases nor passed on any *Federal* question. On the Appeal in this action the Appellant in her opening brief *raised no Federal question* nor did she cite a single Federal decision or opinion, but did cite 8 California decisions and the decisions of the Courts of three other states. The Appellate Court, in rendering its decision affirming the decision of the lower Court, likewise passed on no Federal question, nor cited any Federal case or opinion, *since no Federal question was raised in this second Appeal.*

It therefore appears that the Appeal should be dismissed for failure of Appellant to properly raise the alleged Federal questions in the California Courts so that such Federal questions would be directly passed upon by those tribunals, thereby giving to this Court the benefit of the presentation, authorities cited, and rulings of the Court directly on such Federal questions, if any Federal questions of a substantial nature in fact exist. (*Black v. Cutter Laboratories*, 351 U.S. 292, 76 Sup. Ct. 824, 100 L. Ed. 1188 (annotated); *Herb v. Pitcairn*, 324 U.S. 117, 65 Sup. Ct. 459, 89 L. Ed. 789.)

IV.

NO SUBSTANTIAL FEDERAL QUESTIONS ARE PRESENTED BY APPELLANT, AND APPELLANT WAS ACCORDED DUE PROCESS OF LAW AND AN OPPORTUNITY TO BE HEARD

In Appellant's Jurisdictional Statement are set forth six "grounds", as constituting substantial Federal questions entitling Appellant to be heard in this Court. Appellees contend that *none* of these six grounds set forth a single *substantial* Federal question and they will be discussed in the order in which they appear in the Jurisdictional Statement:

(Preliminarily Appellees point out that the Appellant *does not attack* the *constitutionality* of the California Community Redevelopment Law *nor any* of its provisions; in fact Appellant accepts its constitutionality and cites some of the cases which heretofore have established such constitutionality. (See Page 29 Appellant's Reply Brief in Appellate Case, Fourth Civil No. 5983, citing *Berman v. Parker*, 348 U.S. 26, 76 Sup. Court 98, 99 L. ed. 27; *Fellom v. Redevelop-*

ment Agency of San Francisco, 157 Cal. App. 2d 243, 320 P. 2d 884, review denied 358 U.S. 56, 79 Sup. Court 111, 3 L. Ed. 2d. 47; *Van Hoff v. Redevelopment Agency of San Francisco*, 348 U.S. 897, 99 L. Ed. 705)

In her *First Ground* Appellant appears to contend that since the electors of San Bernardino in 1950, cast a negative vote on an advisory proposition submitted to them by the City Council to the effect that the Council should not at that time create a Redevelopment Agency, that the action of a *different* Council in 1952 creating such a Redevelopment Agency, constituted some abridgment or denial of the electors, the exact nature of which is not stated by Appellant, and that thereby the provisions of the 14th Amendment have been infringed.

The effect of the negative vote on the proposition submitted to electorate in 1950, is clearly set out in the decision of the State Appellate Court. The Court simply held that *under the law of the State of California*, the proposition in question did not constitute a law or ordinance but was only an advisory proposal. It said

> "All that was submitted to the voters was an *advisory* question. Its form admits of no other interpretation. The Court clearly held that the proposition could not be considered an initiatory measure because the electorate did not initiate it. Nor could it be considered a referendum measure since no ordinance or law preceded it which could be referred to the electorate."

Decisions of other California Appellate Courts are cited in the opinion, clearly supporting the decision of

the Appellate Court. (*Whitmore v. Karr*, 2 Cal. App. 2d 590; *Housing Authority v. Superior Court*, 35 Cal. 2d 550) *No Federal question* was raised in connection with this issue by the Appellant, nor passed on by the California Appellate Court since it was not raised, and it was unnecessary to the decision as an adequate non-Federal basis existed. In addition Appellees point out that said proposition was addressed to a Mayor and City Council *who were no longer in office in 1952*, when a resolution creating a Redevelopment Agency was, for the first time, passed and approved by a different City Council.

In her *Second Ground* (Page 17, Jurisdictional Statement) Appellant appears to state that the Federal question raised was that Appellant and others were denied the right to be heard, to an extent of their own choosing, in a hearing before the City Council held in conjunction with the ordinance approving the tentative plan, being Ordinance No. 2217.

The California Redevelopment Law, in *Health and Safety Code, Section 33563*, specifies that the notice of the hearing "shall be published not less than once a week for three successive weeks prior to the date of hearing . . . . . in a newspaper of general circulation, printed and published in the community."

This notice of hearing was given precisely as required by law. The hearing was held before the City Council as set forth in the notice, namely on March 4, 1958. APPELLANT APPEARED AT SAID HEARING AND PARTICIPATED THEREIN. At said hearing (as Appellant admits on Page 18 of the Jurisdictional Statement) Appellant requested *additional* time to present her material. Although the California Community Redevelopment Law is silent on the sub-

ject, nevertheless THE CITY COUNCIL GRANTED SUCH CONTINUANCE. When the *adjourned* hearing was held on March 25, 1958, Appellant was again present and instead of offering evidence or data, asked for a *second* continuance claiming she had not had sufficient time to prepare that she had engaged an expert, but that the expert needed more time. No indication was given whether the findings of the expert would be favorable or unfavorable to her cause. Appellant now claims, that since this additional continuance was not granted, that the refusal was done "arbitrarily and illegally" and that "due process" has not been accorded to her. (On Pages 22-26 of the Jurisdictional Statement Appellant quotes from the record of a hearing on July 1, 1958. All of this material is *entirely irrelevant* to the pending proceeding, as the hearing Appellant complains of is the one held on *March* 4 and *March* 25, 1958, pertaining to the tentative plan.)

It would appear that the three weeks' published notice of hearing and Appellant's *actual participation* at the hearings on March 4 and March 25, 1958, and her failure to indicate how any further continued hearings could be helpful to her cause, amply demonstrate that she has been given an opportunity to be heard and that she has been accorded "due process".

As her *Third Ground* Appellant again complains of a lack of notice and opportunity to defend at the hearing before the City Council on March 4 and March 25, 1958. The case of *Walker v. City of Hutchinson, 352 U.S. 113*, is cited as authority for the proposition that one publication in a newspaper is not sufficient notice on an action to condemn property. This case is entirely irrelevant at this time. *Appellant's property is not now being condemned.* Should the Redevelopment project of the City proceed to the point where property is actually

acquired, the law of the State of California requires that notice of any such action be *personally served* on the Appellant. (California Code of Civil Procedure, Section 1245) No separate Federal question is presented in Appellant's Third Ground.

In her *Fourth Ground* (Page 31 of Jurisdictional Statement) Appellant claims that a Federal question arises in view of the refusal of the City Council to submit Ordinance No. 2233 to the electorate after referendum petitions had been lodged with the City Council, claiming that thereby they have "refused to comply with the plain import of the City Charter of said Municipal Corporation, which this Supreme Court may independently examine....."

The City Council in rejecting the right to a referendum vote, did so on the advice of its City Attorney, who in turn was guided by an examination of the law of the State of California with reference to the right of initiative and referendum. That he correctly advised the City Council is supported by the fact that (1) the trial Court, (2) the Fourth District Court of Appeal, and the (3) State Supreme Court, all sustained his position. *No Federal question* is here involved. The *right of referendum* and its *scope*, is determinable by the referendum provisions in the City Charter (See Appendix), and the decisions of the State of California with reference thereto. The three Courts to which Appellant submitted this issue, had before them said Ordinance No. 2233. *All three Courts* decided that under the law of the State of California and the provisions of the San Bernardino City Charter, the ordinance in question was not one to which the right of referendum applied, on the grounds that this particular ordinance by its content constituted only an *executive* or *administrative* act and *did not constitute*

legislation. A cursory examination of said ordinance will support this view. It contains nothing but a recital of the *findings* of the City Council, a description of the property, and procedural detail. (See Ordinance, p. 6 et seq, Appendix, Juris. Statement) *It contained no law* or *regulations* which would place it in the category of an ordinance on which the electors could exercise their franchise in determining whether such law or regulation should be enacted. *The California cases in support of this view are legion: Housing Authority v. Superior Court, 35 Cal. 2d 550; Kleiber v. City of San Francisco, 18 Cal. 2d 718; McKevitt v. City of Sacramento, 55 Cal. App. 117; Hopping v. City of Richmond, 170 Cal. 605; Lockhart v. City of Bakersfield, 123 Cal. App. 2d 728; Simpson v. Hite, 36 Cal. 2d 125.*

In her *Fifth Ground* Appellant fails to state any Federal Question. She appears to differ with the California Courts in their decision that the act of the City Council in adopting the tentative plan was *legislative*, whereas their act in adopting Ordinance No. 2233 was *administrative*, and she claims that the name-calling of these courts has led to confusion and that she is entitled to have these matters *reclassified* by the Supreme Court. No Federal question is indicated.

In her *Sixth Ground* (Page 38 of Jurisdictional Statement) Appellant only by remote inference suggests the existence of a Federal question. She complains of being deprived of a judicial review of the ordinance approving the *tentative plan* because of the statutory bar of Section 33746 of the California *Health and Safety Code* against *premature* actions. She states that since the City did not adopt the *final plan* by ordinance until more than sixty days after adopting the tentative plan, and since Section 33746

forbids any action until after the adoption of the *final plan*, that thereby she has been deprived of the right to review the ordinance adopting the *tentative plan*.

Section 33746 of the *Health and Safety Code* reads as follows:

> "The findings and determination of an agency and of a legislative body or of either of them, in the adoption and approval of any redevelopment plan may be *judicially reviewed* by a Court of competent jurisdiction. Such action must be brought within *sixty* days after the date of adoption of the ordinance approving the plan. No action shall be brought prior to the adoption of the *final* redevelopment plan."

The answer to Appellant's contention is twofold: (1) Nothing is accomplished by a separate review of the ordinance adopting the *tentative plan since* it is what its name implies, only *tentative*, and may be *entirely changed* at the time of the adoption of the *final plan;* (2) Section 33746 does not limit the judicial review to the adoption of the final plan. Note the language of Section 33746 that "the findings and determinations . . . . . of a legislative body . . . . . in the adoption and approval of *any* redevelopment plan may be judicially reviewed. . . ."

Appellant fails to point out that there is *now pending* her *Petition for Judicial Review* in the San Bernardino County Superior Court, San Bernardino, California, Case No. 94346 and that upon the conclusion of this Appeal said pending Petition for Judicial Review *will be set for trial*, and that at that time Appellant will be accorded a judicial review in accordance with her Petition. It therefore appears that under the

Sixth Ground Appellant's contentions are moot, in addition to the fact that no Federal question is indicated.

That a substantial Federal question must be raised by Appellant to entitle her to a review, see *Zucht v. King*, 260 U.S. 174, 43 S. Ct. 24, 67 L. Ed. 194, and *Tidal Oil Co. v. Flanagan*, 263 U.S. 444, 44 S. Ct. 197, 68 L. Ed. 382: "This Court has always held it a prerequisite to the consideration here of a Federal question in a case coming from a State court that the question should have been raised in that court before decision, or that it should have been actually entertained and considered upon petition to rehear."

V.

JUDGMENTS OF STATE COURTS REST ON AN ADEQUATE NON-FEDERAL BASIS

In the *first* Appeal from the decision of the Fourth District Court of Appeal of California, in Case No. 5983, the Appellate Court *passed on no Federal question*, and its interpretation of the proposition submitted to the voters in 1950, as being only an *advisory* proposition and *not an ordinance* was amply supported by California Appellate Court decisions hereinbefore set forth, and therefore it appears that that question was disposed of on an *adequate non-Federal basis*.

The *second* contention raised by Appellant in this first action was that she did not have time to prepare for the hearing on the tentative plan and that although she did have notice and that the notice complied with the State law, and although she was granted at her own request a continuance of the hearing for three weeks, that nevertheless she was entitled to an *addi-*

tional continuance. The Court disposed of this issue by stating

> "We are satisfied that her Petition makes fully clear that ample time and opportunity for hearing was afforded petitioner by the Council and that on this showing no Court would be justified in holding that the Council abused its discretion".

In this regard, again, *an adequate non-Federal basis exists* in view of the fact that the Notice of Hearing given and the conduct of the Hearing was all in accordance with the California Community Redevelopment Law (Sections 33562-33565 inc. *Health and Safety Code*), and said act provides for no continuance of the hearing although a continuance was actually granted at least *once* by the City Council. Note also that Appellant at no time has challenged the sufficiency and constitutionality of the notice and hearing provisions of the California Community Redevelopment Law, nor any part of the law, nor the law itself.

In her *second Appeal* in Case No. 6243 of the Fourth District Court of Appeal, the only issue presented was whether or not Appellant was entitled to a *referendum* vote on the referendum petitions submitted respecting Ordinance No. 2233. The Appellate Court, like the lower Court, analyzed the ordinance and determined on the basis of abundant California Appellate Court decisions elsewhere cited herein, that said ordinance was not of the kind or character to which the power of referendum applied. It therefore appears that there is an *adequate non-Federal basis* for this decision.

In the first Appeal the Appellate Court applied still another *non-Federal* basis for disposing of the Appeal, namely that the action was *prematurely brought* under

Section 33746 of the *Health and Safety Code*. Says the Court "from the foregoing it is crystal that the Plaintiff's action was commenced in *direct contravention* of the legislative provisions, since it was commenced before any final redevelopment plan ordinance had been or could have been adopted".

The Supreme Court is without jurisdiction to review a judgment of a State court which rests on one or more adequate non-Federal grounds. (*Ellis v. Dixon*, 349 U.S. 458, 75 S. Ct. 850, 99 L. Ed. 1231; *Stembridge v. Georgia*, 343 U.S. 541, 72 S. Ct. 834, 96 L. Ed. 1130; *Young v. Ragen*, 337 U.S. 235, 69 S. Ct. 1073, 93 L. Ed. 1333.)

VI.

CONCLUSION

Essentially Appellant's contentions only hint at the existence of any Federal questions, or violation of any constitutional rights or guarantees to which Appellant is entitled as a United States citizen. Appellant throughout her *Jurisdictional Statement* complains of the fact that steps are being taken which will eventually lead to the loss of her property. The necessity of taking private property for public uses is essential to the exercise of governmental functions. Under the *California Community Redevelopment Law* Appellant's property *cannot* be taken except by *eminent domain* proceedings in which she will be accorded due notice and an opportunity to appear and protect her rights. *This state of the proceedings has not yet arrived.*

In complaining of the methods of the City Council in holding hearings, Appellant implies that such hearings

should be conducted like *judicial* hearings, by the formal presentation of evidence, cross-examination of witnesses, etc. *Legislative hearings* such as are held before the City Council are different from *judicial hearings* where the regular rules of evidence and method of examining witnesses apply. As stated by the Court in the case of *Wilson v. City of Long Branch, 27 N.J. 360, 142 A. 2d 837 (Certiorari denied 358 U.S. 873)*:

> A distinction must be recognized between a *legislative* investigation and *hearing* and a *judicial hearing*. No adjudication of property rights is called for here, nor is there any taking of property involved. There is simply preliminary investigation and report by a subordinate agency of government. These are typical of the legislative process. As has been shown above, investigations or study of the desirability of acquiring private property for public use, as well as the decision to take, are preliminary matters which have always been regarded as legislative in character, and not subject to the hearing requirements of due process. If this were not so government could not function effectively. We must assume that the legislature in adopting the act knew the state of the law and the difference between a legislative and a judicial hearing." (This case was one involving the Community Redevelopment Law of the State of New Jersey.) See also *Norwegian Nitro-Production Co. v. United States, 288 U.S. 294, 53 Sup. Court 350, 77 L. Ed. 796.*

It is therefore respectfully submitted that the Appeal should be dismissed: (a) for want of compliance with the Rules of this Court; (b) for want of raising any substantial Federal question; (c) for failure to

raise any Federal question timely or in a proper manner; and (d) because the decisions appealed from rest on an adequate non-Federal basis.

WHEREFORE, Appellees pray that the Appeal be dismissed, or, in the alternative, that the judgments be affirmed; and if the Court should treat the Appeal as an application for Writ of Certiorari, that the application be denied.

DATED: San Bernardino, California,

June 30, 1960.

Respectfully submitted,

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(Appendix Follows)